[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 228.

BERT ROSS, APPELLANT,

vs.

MARTIN AGUIRRE, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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1 COMPLAINT AND PETITION FOR WRIT OF HABEAS CORPUS.

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

To the honorable the judges of the circuit court of the United States for the northern district of California:

The complaint of Bert Ross respectfully shows:

That he is restrained of his liberty by Martin Aguirre, who is the warden of the State prison of the State of California, at San Quentin, California, and is by the said warden now confined in said prison in violation of the fourteenth amendment to the Constitution of the United States.

That the said warden so detains him in his custody in said prison solely by virtue of a certain commitment issued out of the superior court of the county of San Luis Obispo, State of California, on the 9th day of November, 1901, of which the following is a copy:

"Superior court of the State of California, county of San Luis Obispo.

"THE PEOPLE OF THE STATE OF CALIFORNIA, plaintiff,
vs.
BERT ROSS, DEFENDANT.

"The district attorney and the defendant in above entitled cause with his counsel being present in court and no sufficient cause being alleged or shown or appearing to the court why this court should not
2 make an order fixing the time when the judgment heretofore pronounced in this cause shall be executed, and further requiring the sheriff of San Luis Obispo County, California, to deliver the defendant, Bert Ross, to the warden of the State prison of the State of California, at San Quentin, in the county of Marin, State aforesaid, and further requiring said warden to so execute said judgment at such a time to be so fixed, and no legal reason having been shown to exist against the execution of the said judgment, and there being no legal reason against the execution of the said judgment;

"And whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said cause, as follows, to wit: 'We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty.

"'P. O'LEARY, *Foreman.*'

"And whereas upon said verdict the judgment aforesaid was upon proceedings duly had, pronounced by this court, which judgment has become and now is final, and is in full force and effect;

"And whereas the day heretofore fixed for the execution of said judgment has passed and said judgment has not been executed:

"It is ordered that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him

detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you, Bert Ross, to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden that you, said Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement until Friday, the tenth day of January, 1902, and on the said day, between the hours of sunrise and noon of said day, that the said judgment be carried into execution, and that you, Bert Ross,
3 for the wilfull, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul.

"E. P. UNANGST, *Judge.*

"Dated November 9, 1901."

That the judgment referred to in said commitment is a judgment which was, on the 23rd day of May, 1900, rendered in the said superior court, of which judgment the following is a copy:

"*Judgment.*

"In the superior court of the State of California, in and for the county of San Luis Obispo.

"Tuesday, May 15, 1900. Present: Hon. E. P. Unangst, judge; E. C. Ivins, sheriff; John Whicher, clerk.

"THE PEOPLE OF THE STATE OF CALIFORNIA,
vs.
"BERT ROSS.

"This being the time fixed by the court for passing judgment, and district attorney, defendant, and his counsel, Graves & Graves, being present in court, the court made the following statement: 'In this case, you, Bert Ross, was indicted by the grand jury of the county of San Luis Obispo, State of California, by indictment duly found, returned, presented, and filed in this court on December 22d, 1899, by said grand jury, charging you, Bert Ross, with the crime of felony, to wit, murder, in that you did wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Will J. Ward, a human being, as alleged and set forth and charged in said indictment, and upon this indictment in this court, on January 27th, 1900, you then and there being present with your counsel, was duly arraigned, and in said court thereafter, on, to wit, February 5th, 1900, you then and there being present
4 with your counsel, entered the plea of not guilty of the offense charged in said indictment; and on this plea trial was had, a jury impaneled, and on the 5th day of May, A. D. 1900, the jury in said cause returned into this court the verdict: We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and in our judgment he should

be punished by the infliction of the death penalty. P. O'Leary, foreman. And thereupon, in open court, an order was made fixing May 15th, 1900, at 1:30 p. m., as the time for pronouncing judgment on said verdict. Have you any legal cause to show why judgment should not be pronounced against you? On motion of defendant, through his counsel, passing of judgment is continued until May 19th, 1900, at 9:30.'

"Wednesday, May, 23, 1900. Court opened at 10 o'clock. Present: Hon. E. P. Unangst, judge; John Whicher, clerk; E. C. Ivins, sheriff. (Title of court and cause.)

"The district attorney, defendant, and his counsel being present in court, defendant makes a motion in arrest of judgment, which is argued, submitted, and denied. The defendant then moves for a new trial, on grounds stated in motion, and for the time in which to secure and present affidavits as to newly discovered evidence; argued, submitted, and denied.

"No sufficient cause been alleged or shown or appearing to the court why judgment should not be pronounced, the court now renders its judgment: 'That whereas you, Bert Ross, have been duly convicted in this court of crime of murder of the first degree, upon the verdict duly found in said court as follows, to wit: We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty. P. O'Leary, foreman. It is therefore ordered, adjudged, and decreed, and the judgment of the law and the sentence of this court is now pronounced as follows: The judgment of the law and the sentence of the court is that you, Bert
4 Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden, that you, Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement, until such day as shall hereafter be designated and fixed in the warrant of execution to be issued herein; and on the day so designated and fixed in said warrant of execution, and between the hours therein named, that you, Bert Ross, for the willful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul."

That the said judgment and the said order of the said court, so made on the 9th day of November, 1901, and the said commitment based thereon, are and each of them is wholly void and of no effect by reason of the following matters:

That by the constitution of the said State of California (Art. I, sec. 8) no person can be convicted of a capital offense except upon the indictment of a grand jury or upon an information after examination and commitment by a magistrate; and the law of said State authorizes prosecution for such offenses only upon such indictment or information.

That by the law of said State (C. C. P., secs. 204, 205, 208, 209, 211, 241, 242) a grand jury is required to be drawn by the superior court by selection in the manner provided by law from a list of names selected and certified to such court by the board of supervisors of the county. Nevertheless, the said court did not draw or select any grand jury from any list of names so selected by the board of supervisors of said
6 county; but, without authority of law, itself selected the names of certain persons not on any list selected or certified by said board of supervisors, and from the said list of names so selected by said court, and without authority of law, drew a grand jury, which proceedings of said court are set forth in the records of said court as follows:

(Title.)

"In the matter of grand jurors for the ensuing year of 1899.

"It is hereby ordered that the estimated number of grand jurors required for the transaction of the business of the said court during the ensuing year of 1899, be and is hereby fixed and designated at thirty-five (35).

"Dated January 28, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*"

(Title.)

"In the matter of the grand jurors for the ensuing year of 1899.

"In accordance with and in pursuance of the order heretofore this day made in the above-entitled matter, the following electors of San Luis Obispo County, California, having all the qualifications and being suitable and competent persons to serve as grand jurors, are hereby selected as the persons from whom shall be drawn grand jurors to serve in the Superior court for the ensuing year of 1899." [Here follows a list showing the names of thirty-five persons, and their place of residence in said county.]

"Dated January 28th, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "List of names selected by Judge E. P. Unangst to serve for ensuing year 1899.

"Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*"

7 (Title.)

"By the court: Whereas the business of our superior court aforesaid requires the attendance of a grand jury, and no grand jury being in attendance upon said court, it is

"Ordered that twenty-five grand jurors be drawn, in the manner required by law, and be summoned by the sheriff of said county to be and appear before said court, at the court room thereof, on Monday, December the 11th, 1899, at ten o'clock a. m., to act as grand jurors.

"It is further ordered that said drawing take place at the hour of ten o'clock a. m., November the 22d, 1899.

"Done in open court this 21st day of November, 1899, at 3.15 o'clock p. m.

"E. P. UNANGST, *Judge.*

"Attest: JOHN WHICHER, *Clerk.*

[SEAL.]

(Endorsed:) "Order for grand jury. Filed Nov. 21, 1899. John Whicher, clerk. By Wm. Mallagh, deputy."

That from the twenty-five names so selected and drawn by said court the said court proceeded to empanel and did empanel an alleged grand jury, which body so empaneled found against the defendant the indictment mentioned in said judgment; and the said defendant in said action was tried and convicted upon said indictment and not otherwise, and not upon any other indictment, nor upon any information whatsoever.

That by the law of the State of California an indictment found by a body of men not lawfully empaneled as a grand jury is void, and any judgment rendered thereupon is beyond the jurisdiction of the court and void (*Bruner* v. *Superior Court*, 92 Cal., 239; *People* v. *Thurston*, 5 Cal., 69; *Levy* v. *Wilson*, 69 Cal., 105). Furthermore, by the law of said state a defendant is entitled to challenge the panel of a grand jury for one or more of the following causes only: that the requisite number of ballots was not drawn from the jury box of the county; that
8 notice of the drawing of the grand jury was not given, or that the drawing was not had in the presence of the officers designated by law; and if convicted the defendant cannot, upon appeal, present to the supreme court the question of whether such grand jury was otherwise legally selected, drawn, or empaneled, nor can a judgment of conviction be reversed on appeal on account of any objection to such panel, except such objections as may so be raised by challenge to such panel. (*P. C.*, secs. 894, 895; *Bruner* v. *Superior Court supra*, *People* v. *Southwell*, 46 Cal., 141; *People* v. *Welch*, 49 Cal., 174; *People* v. *Colby*, 54 Cal., 37; *People* v. *Hunter*, 54 Cal., 65.)

By reason of the matters aforesaid the said judgment and conviction are wholly void, and do not constitute due process or any process of law by which the same can be enforced against your petitioner; yet, nevertheless, the said warden continues to hold your petitioner in custody by authority of the same, and will, if your petitioner be not sooner discharged from his custody, take the life of your petitioner on the 10th day of January, 1902; and your petitioner has no remedy by appeal nor in the ordinary course of law.

May it, therefore, please your honors to grant to your petitioner a writ of habeas corpus directed to the said Martin Aguirre, requiring him to bring the body of your petitioner before your honorable court with the true cause of his detention, and that thereupon your honorable court do discharge your petitioner from the custody aforesaid.

BERT ROSS, *Petitioner.*

STATE OF CALIFORNIA,
County of Marin, ss:

BERT ROSS, being duly sworn, deposes and says that he is the
9 petitioner above named and that the facts set forth in the foregoing complaint are true.

BERT ROSS.

Subscribed and sworn to before me this 31st day of December, 1901.
[SEAL.] F. W. REYNOLDS,
Notary Public in and for Marin County, Cal.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross on habeas corpus. Complaint & petition for writ of habeas corpus. Filed January 2, 1902, Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

10 *Order denying application for writ of habeas corpus.*

At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Thursday, the 2nd day of January, in the year of our Lord one thousand nine hundred and two.
Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross on habeas corpus. No. 13191.

In this matter W. C. Van Fleet and W. B. Treadwell, esqs., attorneys for Bert Ross, appeared in open court, and having been granted leave in that behalf, filed and presented to the court the petition of said Bert Ross for a writ of habeas corpus and submitted the same to the court for its consideration. And the same having been fully considered, it was ordered that the petition of said Bert Ross for a writ of habeas corpus herein be, and the same hereby is, denied upon the ground that application for relief on behalf of said Bert Ross should first be made to the courts of the State of California.

11 *Certified copy of record from supreme court of the State of California.*

S. F. No. In the supreme court of the State of California.

In the matter of Bert Ross on habeas corpus.

To the honorable the supreme court of the State of California:

The petition of William Graves respectfully shows to the court:
That the said Bert Ross is restrained of his liberty by Martin Aguirre, who is the warden of the state prison of the State of California, at San Quentin, California, and is by the said warden now confined in said prison in violation of the fourteenth amendment to the Constitution of the United States.
That the said warden so detains the said Bert Ross in his custody in

said prison solely by virtue of a certain commitment issued out of the superior court of the county of San Luis Obispo, State of California, on the 9th day of November, 1901, of which the following is a copy:

"Superior court of the State of California, county of San Luis Obispo.

"THE PEOPLE OF THE SATE OF CALIFORNIA, PLAINTIFF,
vs.
BERT ROSS, DEFENDANT.

12 "The district attorney and the defendant in above entitled cause with his counsel being present in court and no sufficient cause being alleged or shown or appearing to the court why this court should not make an order fixing the time when the judgment heretofore pronounced in this cause shall be executed, and further requiring the sheriff of San Luis Obispo County, California, to deliver the defendant, Bert Ross, to the warden of the State prison of the State of California, at San Quentin, in the county of Marin, State aforesaid, and further requiring said warden to so execute said judgment at such a time to be so fixed, and no legal reason having been shown to exist against the execution of the said judgment, and there being no legal reason against the execution of the said judgment;

"And whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said cause, as follows, to wit: 'We, the jury in the above entitled cause, do find the defendant Bert Ross guilty of murder of the first degree as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty.

"'P. O'LEARY, *Foreman*;'

"And whereas, upon said verdict the judgment aforesaid was upon proceedings duly had, pronounced by this court, which judgment has become and now is final, and is in full force and effect;

"And whereas the day heretofore fixed for the execution of said judgment has passed and said judgment has not been executed:

"It is ordered that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you, Bert Ross, to the Warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California,
13 and after such delivery to said warden that you, said Bert Ross, be kept and detained in said State prison at San Quentin by the warden thereof in close confinement until Friday, the tenth day of January, 1902, and on the said day, between the hours of sunrise and noon of said day, that the said judgment be carried into execution, and that you, Bert Ross, for the wilful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead. And may God have mercy on your soul.

"E. P. UNANGST, *Judge*.

Dated November 9, 1901."

That the judgment referred to in said commitment is a judgment which was, on the 23rd day of May, 1900, rendered in the said superior court, of which judgment the following is a copy:

"*Judgment.*

"In the superior court of the State of California, in and for the county of San Luis Obispo.

"Tuesday, May 15, 1900. Present: Hon. E. P. Unangst, judge; E. C. Ivins, sheriff; John Whicher, clerk.

"THE PEOPLE OF THE STATE OF CALIFORNIA)
vs.
"BERT ROSS.)

"This being the time fixed by the court for passing judgment, and district attorney, defendant and his counsel, Graves & Graves, being present in court, the court made the following statement: 'In this case you, Bert Ross, was indicted by the grand jury of the county of San Luis Obispo, State of California, by indictment duly found, returned, presented, and filed in this court on December 22d, 1899, by said grand jury, charging you, Bert Ross, with the crime of felony, to wit, murder, in that you did wilfully, unlawfully, feloniously, and with malice aforethought, kill and murder one Will J. Ward, a human being, as
14 alleged and set forth and charged in said indictment, and upon this indictment in this court, on January 27th, 1900, you then and there being present with your counsel, was duly arraigned, and in said court thereafter, on, to wit, February 5th, 1900, you then and there being present with your counsel, entered the plea of not guilty of the offense charged in said indictment; and on this plea trial was had, a jury impaneled, and on the 5th day of May, A. D. 1900, the jury in said cause returned into this court their verdict: 'We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and in our judgment he should be punished by the infliction of the death penalty. P. O'Leary, foreman.' And thereupon, in open court, an order was made fixing May 15th, 1900, at 1.30 p. m., as the time for pronouncing judgment on said verdict. Have you any legal cause to show why judgment should not be pronounced against you? On motion of defendant, through his counsel, passing of judgment is continued until May 19th, 1900, at 9.30.

"Wednesday, May 23, 1900. Court opened at 10 o'clock. Present, Hon. E. P. Unangst, judge; John Whicher, clerk; E. C. Ivins, sheriff. (Title of court and cause.)

"The district attorney, defendant, and his counsel being present in court, defendant makes a motion in arrest of judgment, which is argued, submitted, and denied. The defendant then moves for a new trial, on grounds stated in motion, and for time in which to secure and present affidavits as to newly discovered evidence; argued, submitted, and denied.

"No sufficient cause been alleged, or saown, or appearing to the court why judgment should not be pronounced, the court now renders its judg-

ment: 'That whereas you, Bert Ross, have been duly convicted in this court of the crime of murder of the first degree, upon the verdict duly found in said court, as follows, to wit: "We, the jury in the above-entitled cause, do find the defendant, Bert Ross, guilty of murder of the first degree, as charged in the indictment, and, in our
15 judgment, he should be punished by the infliction of the death penalty. P. O'Leary, foreman." It is therefore ordered, adjudged, and decreed, and the judgment of the law and the sentence of this court is now pronounced as follows: The judgment of the law and the sentence of the court is that you, Bert Ross, be taken hence by the sheriff of the county of San Luis Obispo, State of California, and be by him detained in close confinement in the county jail of said county, and within ten days from this date the said sheriff is ordered and directed to deliver you to the warden of the State prison of the State of California at San Quentin, in the county of Marin, State of California, and after such delivery to said warden, that you, Bert Ross, be kept and detained in said State prison at San Quentin, by the warden thereof, in close confinement, until such day as shall hereafter be designated and fixed in the warrant of execution to be issued herein; and on the day so designated and fixed in said warrant of execution, and between the hours therein named, that you, Bert Ross, for the wilful, deliberate, and premeditated murder of Will J. Ward, of which you have been duly convicted, be by the said warden of the said State prison aforesaid, and within the walls of said State prison, hanged by the neck until you shall be dead, and may God have mercy on your soul."

That the said judgment and the said order of the said court, so made on the 9th day of November, 1901, and the said commitment based thereon, are and each of them is wholly void and of no effect by reason of the following matters:

That by the constitution of the said State of California, no person can be convicted of a capital offense except upon the indictment of a grand jury, or upon an information after examination and commitment by a magistrate; and the law of said State authorizes prosecution for such offense only upon such indictment or information.

That by the law of said State a grand jury is required to be drawn by the superior court by selection, in the manner provided by law, from a list of names selected and certified to such court by the board of supervisors of the county. Nevertheless, the said court did not draw
16 or select any grand jury from any list of names so selected by the board of supervisors of said county; but, without authority of law, itself selected the names of certain persons not on any list selected or certified by said board of supervisors, and from the said list of names so selected by said court, and without authority of law, drew a grand jury, which proceedings of said court are set forth in the records of said court as follows:

(Title.)

"In the matter of grand jurors for the ensuing year of 1899.

"It is hereby ordered that the estimated number of grand jurors required for the transaction of the business of the said court during the

ensuing year of 1899 be and is hereby fixed and designated at thirty-five (35).

"Dated January 28, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "Filed Jan'y 28, 1899.

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*

(Title.)

"In the matter of the grand jurors for the ensuing year of 1899.

"In accordance with and in pursuance of the order heretofore this day made in the above-entitled matter, the following electors of San Luis Obispo County, California, having all the qualifications and being suitable and competent persons to serve as grand jurors, are hereby selected as the persons from whom shall be drawn grand jurors to serve in the superior court for the ensuing year of 1899: (Here follows a list showing the names of thirty-five persons, and their place of residence in said county.)

"Dated January 28th, 1899.

"E. P. UNANGST, *Judge.*

(Endorsed:) "List of names selected by Judge E. P. Unangst to serve for ensuing year 1899.

"Filed Jan'y 28, 1899.

17

"JOHN WHICHER, *Clerk.*

"By WM. MALLAGH, *Deputy.*

(Title.)

"By the Court: Whereas, the business of our superior court aforesaid requires the attendance of a grand jury, and no grand jury being in attendance upon said court, it is

"Ordered, that twenty-five grand jurors be drawn in the manner required by law and be summoned by the sheriff of said county, to be and appear before said court at the court room thereof on Monday, December the 11th, 1899, at ten o'clock a. m., to act as grand jurors.

"It is further ordered that said drawing take place at the hour of ten o'clock a. m., November the 22d, 1899.

"Done in open court this 21st day of November, 1899, at 3.15 o'clock p. m.

"E. P. UNANGST, *Judge.*

"Attest: JOHN WHICHER, *Clerk.*

[SEAL.]

(Endorsed:) "Order for grand jury. Filed Nov. 21, 1899. John Whicher, clerk. By Wm. Mallagh, deputy."

That from the twenty-five names so selected and drawn by said court the said court proceeded to empanel and did empanel an alleged grand jury, which body so empaneled found against the defendant the indict-

ment mentioned in said judgment; and the said defendant in said action was tried and convicted upon said indictment and not otherwise, and not upon any other indictment, nor upon any information whatsoever.

That by the law of the State of California an indictment found by a body of men not lawfully empaneled as a grand jury is void, and any judgment rendered thereupon is beyond the jurisdiction of the court and void. Furthermore, by the law of said State a defendant is entitled to challenge the panel of a grand jury for one or more of the follow-
18 ing causes only: That the requisite number of ballots was not drawn from the jury box of the county; that notice of the drawing of the grand jury was not given; or that the drawing was not had in the presence of the officers designated by law; and if convicted the defendant can not, upon appeal, present to the Supreme Court the question of whether such grand jury was otherwise legally selected, drawn, or empaneled, nor can a judgment of conviction be reversed on appeal on account of any objection to such panel, except such objections as may so be raised by challenge to such panel.

By reason of the matters aforesaid, the said judgment and conviction are wholly void, and do not constitute due process or any process of law by which the same can be enforced against the said Bert Ross; yet, nevertheless, the said warden continues to hold the said Bert Ross in custody by authority of the same, and will, if the said Bert Ross be not sooner discharged from his custody, take the life of said Bert Ross on the 10th day of January, 1902; and the said Bert Ross has no remedy by appeal nor in the ordinary course of law.

Wherefore your petitioner respectfully prays that your honorable court grant him a writ of habeas corpus, directed to the said Martin Aguirre, warden of said State prison, as aforesaid, requiring him to bring the body of the said Bert Ross before your honorable court, with the true cause of his detention, and that thereupon your honorable court do discharge the said Bert Ross from the custody aforesaid.

WILLIAM GRAVES,
Petitioner.

STATE OF CALIFORNIA,
City and County of San Francisco:

WILLIAM GRAVES, being duly sworn, deposes and says that he is the petitioner above named and that the facts set forth in the foregoing petition are true.

WILLIAM GRAVES.

Subscribed and sworn to before me this 2nd day of January, 1902.

GEO. W. ROOT,
Clerk,
By W. E. BRADY,
Deputy Clerk Supreme Court.

19 (Endorsed:) Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy. By the court. Writ denied Jan'y 2, 1902. Beatty, C. J. Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy.

20 S. F. No. ——. In the supreme court of the State of California.

In the matter of Bert Ross, on habeas corpus.

Petitioner's authorities.

The act of March 23, 1893 (Stats., 1893, 297), purporting to amend sections 204, 205, 206, and 208 of the Code of Civil Procedure, is unconstitutional in that the subject of the act is not stated in the title.

Lewis v. Dunne, 66 Pac., 478.

A grand jury not selected, drawn, or summoned according to law is an illegal body; and no court has any jurisdiction to try a defendant upon an indictment found by such a body, and a conviction upon such indictment is void.

Bruner v. Superior Court, 92 Cal., 239;
Ex parte Farley, 40 Fed., 66;
United States v. Dixon, 44 Fed., 401;
Ex parte Reynolds, 35 Tex. Cr., 437.

A "State" deprives one of liberty without due process of law when a court of that State, without jurisdiction under the law of the State, sentences him to imprisonment.

Ex parte Ulrich, 42 Fed., 587;
Ex parte Kelly, 46 Fed., 653;
Ex parte Glenn, 111 Fed., 257.

The question whether a grand jury was summoned from names illegally selected can not be raised upon appeal, for it is not made a ground of challenge to the panel or of arrest of judgment, and only
21 objections so allowed to be made can be raised on appeal.

Bruner v. Superior Court, 92 Cal., 239.

Habeas corpus is therefore the only remedy.

WM. GRAVES,
Petitioner.

W. C. VAN FLEET,
Of Counsel.

(Endorsed:) Filed Jan. 2, 1902. Geo. W. Root, clerk. By A. E. Hornlein, deputy.

22 S. F. No. ——. In the supreme court of the State of California.

In the matter of Bert Ross, on habeas corpus.

To the Honorable William H. Beatty, Chief Justice of the Supreme Court of the State of California:

Now comes William Graves, petitioner herein, and says that, on the 2nd day of January, 1901, this court entered judgment herein against this petitioner denying his application for a writ of habeas corpus on behalf of the said Bert Ross, in which judgment certain errors were committed to the prejudice of this petitioner and the said Bert Ross, all of which errors will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this petitioner prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of

the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

WM. GRAVES,
Petitioner.

W. C. VAN FLEET,
Of Counsel.

(Endorsed:) Filed Jan. 3, 1902. Geo. W. Root, clerk. By A. W. Johnson, deputy. Writ denied. W. H. Beatty, chief justice of the supreme court of California. January 3, 1902.

23 In the Supreme Court of the United States.

In the matter of the petition of William Graves and Bert Ross, appellants.

Assignment of errors.

Now comes William Graves, the petitioner herein, and the said Bert Ross by the said William Graves, his attorney, and say that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

1. That no indictment by any grand jury was ever found or returned against the said Bert Ross.

2. That the superior court of the county of San Luis Obispo had no jurisdiction to try the said Bert Ross upon the indictment mentioned in the record herein, because said indictment was not found by any grand jury selected according to law.

3. That the said superior court, having no jurisdiction to try the said Bert Ross upon said pretended indictment, its judgment of conviction is void and does not constitute due process of law by which the said Bert Ross can lawfully be deprived of his liberty or life.

4. That the supreme court of the State of California erred in refusing to grant a writ of habeas corpus for the body of the said Bert Ross.

Wherefore, the said William Graves, and the said Bert Ross, by his attorney, William Graves, pray that the order of the said supreme court of the State of California denying the writ of habeas corpus prayed for in this cause be reversed, and that the said court be ordered and directed to grant said writ.

_____ _____,
Petitioner.

(Endorsed:) Filed Jan. 3, 1902. Geo. W. Root, clerk, by A. W. Johnson, deputy.

24 I, George W. Root, clerk of the supreme court of the State of California, do hereby certify that the above and foregoing are full, true, and correct copies of the petition for writ of habeas corpus, petitioner's authorities, order denying writ of habeas corpus, petition to chief justice for writ of error, assignment of errors, and order of chief justice denying the writ of error, in the matter of Bert Ross on habeas corpus, and that the same constitute the whole of the record in said proceeding.

Witness my hand and the seal of said court this 4th day of January, 1902.

[Seal of supreme court, State of California.]

GEO. W. ROOT,
Clerk,
By A. W. JOHNSON,
Chief Deputy Clerk.

(Endorsed:) No. 13191. In U. S. circuit court. No. 874. Crim. supreme court of the State of California. In the matter of Bert Ross, on habeas corpus. Certified copy of record from supreme ct. Cal. Filed Jan. 6, 1902. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

25 *Order denying petition for writ, &c., allowing appeal to Supreme Court of United States, etc.*

At a stated term, to wit: the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 6th day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross on habeas corpus. No. 13191.

In this matter, W. C. Van Fleet and W. B. Treadwell, esqs., attorneys for Bert Ross, petitioner herein, appeared before the court, and said attorneys (having filed a certified copy of the record of certain proceedings had before the Supreme Court of the State of California on behalf of said Bert Ross) asked and were granted leave to renew, and did thereupon renew, their application for a writ of habeas corpus on behalf of said Bert Ross as prayed in his petition filed in this court upon January 2nd, 1902.

Thereupon said petition and certified copy of record, and the renewed application thereon, were submitted to the court, and the same having been fully considered, it was ordered that the writ of habeas corpus prayed in and by the petition of said Bert Ross herein be and hereby is denied, and that said petition be and hereby is dismissed.

Thereafter said attorneys for petitioner filed and presented to the court the petition of said Bert Ross for an order allowing an appeal to the Supreme Court of the United States from the foregoing order denying his application for a writ of habeas corpus, hereinsaid petition for appeal being accompanied by an assignment of errors to be urged by him upon his appeal.

And said petition for appeal having been fully considered, it was ordered that the same be granted, and that said Bert Ross be
26 and he hereby is allowed to prosecute an appeal to the Supreme Court of the United States from the foregoing order denying his application for a writ of habeas corpus herein; that the amount of the bond or undertaking for costs upon said appeal to be filed by said petitioner be and hereby is fixed at the sum of $500.00; that upon the filing

and approval of such bond or undertaking citation issue in form as prescribed by law, and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the Supreme Court of the United States.

27 In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross on habeas corpus. Petition for appeal.

The above petitioner, conceiving himself aggrieved by the order made and entered on the 6th day of January, 1902, in the above-entitled cause, denying the application of said petitioner for a writ of habeas corpus, does hereby appeal from said order to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herein; and he prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated January 6, 1902.

WILLIAM GRAVES,
Attorney for Petitioner.

The foregoing claim of appeal is allowed.
Dated January 6, 1902.

WM. W. MORROW,
Circuit Judge.

28 *Assignment of errors.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross on habeas corpus.

And now, on the 6th day of January, 1902, comes the said petitioner, by William Graves, his attorney, and says that the order in said cause, denying his application for a writ of habeas corpus, is erroneous and against the just rights of said petitioner for the following reasons:

1. Because it appears by his petition herein that he is entitled to a writ of habeas corpus from this court.

2. Because it appears by said petition that no indictment by any grand jury was ever found or returned against the said petitioner.

3. Because the superior court of the County of San Luis Obispo, State of California, had no jurisdiction to try the said petitioner upon the indictment mentioned in the record herein, for the reason that said indictment was not found by any grand jury selected according to law.

4. Because the judgment of said superior court convicting the said petitioner upon said pretended indictment is void, and did not constitute due process of law by which the said petitioner could lawfully be deprived of his liberty or life, for the reason that said superior court had no jurisdiction to try the said petitioner upon said pretended indictment.

5. Because, by the law of the State of California, the said petitioner had no remedy in that behalf by appeal.

6. Because the said petitioner did duly apply to the supreme court of the said State of California for a writ of habeas corpus, for the
29 reasons and on the grounds set forth in his petition herein, and the said supreme court of the State of California refused to issue said writ; whereupon said petitioner duly applied to the chief justice of said court to allow a writ of error to the Supreme Court of the United States from said order refusing to issue said writ of habeas corpus, but the said chief justice refused to allow said writ of error; and petitioner has no other remedy in the courts of said State.

Wherefore, the said petitioner prays that the said order be reversed, and that the said court may be directed to grant to him a writ of habeas corpus, as prayed for in his said petition.

WILLIAM GRAVES,
Attorney for Petitioner.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross, on habeas corpus. Petition for appeal and assignment of errors. Filed January 6, 1902. Southard Hoffman, clerk. By W. D. Beaizley, deputy clerk.

30 *Undertaking on appeal.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

BERT ROSS, APPELLANT,
vs.
MARTIN AGUIRRE, APPELLEE.

Whereas, lately, at a circuit court of the United States for the northern district of California, in an application of said Bert Ross for a writ of habeas corpus to be directed to one Martin Aguirre, an order was entered by said court against said Bert Ross, denying the said application and refusing to issue said writ, and the said Bert Ross having taken and obtained an appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the aforesaid order, and a citation directed to the said Martin Aguirre citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington on the 27 day of January next.

Now, therefore, we, the undersigned, William Graves and W. C. Van Fleet, do hereby undertake and promise, on the part of the said Bert Ross, that the said Bert Ross shall prosecute said appeal to effect and answer all damages and costs, if he fail to make the said plea good, not exceeding the sum of five hundred dollars ($500.00), for the payment of

which amount we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, to the said Martin Aguirre.

31 Sealed with our seals, and dated this 6th day of January, 1902.

WILLIAM GRAVES. [SEAL.]
W. C. VAN FLEET. [SEAL.]

Approved:

WM. W. MORROW,
Circuit Judge.

(Endorsed:) No. 13191. In the circuit court of the United States for the northern district of California. In the matter of Bert Ross, on habeas corpus. Undertaking on appeal. Filed January 6, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

32 *Affidavit of poverty.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

STATE OF CALIFORNIA,
County of Marin, ss:

BERT ROSS, being duly sworn, deposes and says: That he is the petitioner in the above entitled proceeding; that the nature of said proceeding is to obtain a writ of habeas corpus directed to the warden of the State prison of the State of California at San Quentin, California, directing him to produce the body of said petitioner in said court, to be dealt with according to law, and to obtain a discharge of this petitioner from the custody of said warden; and the ground of said proceeding is that the said warden, acting as such, is depriving the said petitioner of his liberty without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

And deponent further deposes and says that because of his poverty he is unable to pay the costs or any costs of said proceeding, or to give any security for the same, and that he believes that he is entitled to the redress he seeks by said proceeding.

BERT ROSS.

Subscribed and sworn to before me this 11th day of January, 1902.

[SEAL.] F. W. REYNOLDS,
Notary Public in and for Marin County, Cal.

(Endorsed:) Filed January 13, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

33 At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 13th day of January, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William W. Morrow, circuit judge.

In the matter of Bert Ross, on habeas corpus. No. 13191.

Minute order that services be performed without costs to petitioner.

Upon motion of W. B. Treadwell, esq., one of the attorneys for petitioner, and on consideration of the affidavit of petitioner, this day filed in that behalf, it is

Ordered, that pursuant to the provisions of the act of Congress of July 20, 1892, the services heretofore performed, and the services to be performed by the clerk of this court, on behalf of petitioner, be without cost to said petitioner.

34 *Affidavit of service of citation.*

In the circuit court of the United States for the northern district of California.

In the matter of Bert Ross, on habeas corpus.

BERT ROSS, APPELLANT.
vs.
MARTIN AGUIRRE, APPELLEE.

UNITED STATES OF AMERICA,
Northern District of California, ss:

WILLIAM GRAVES, being duly sworn, deposes and says: That he is one of the attorneys for the petitioner and appellant in the above entitled proceeding. That, on the 7th day of January, 1902, he served upon Martin Aguirre, the warden of the State prison of the State of California, at San Quentin, California, the citation on appeal in said matter, by exhibiting to the said Martin Aguirre the said original citation, and then and there delivering to him a true copy thereof.

WILLIAM GRAVES.

Subscribed and sworn to before me this 14th day of January, 1902.
[SEAL.] M. EGAN,
Notary Public.

(Endorsed:) Filed January 15, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

35 In the circuit court of the United States, ninth judicial circuit, northern district of California.

In the matter of Bert Ross, on habeas corpus. No. 13191.

Certificate to record on appeal.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages, numbered from 1 to 34, inclusive, to be a full, true, and correct copy of the record and all

proceedings in the above entitled matter, and that the same together constitute the transcript of the record herein, upon appeal to the Supreme Court of the United States, and that the original citation is annexed hereto.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this day of January, A. D. 1902.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

36 In the Supreme Court of the United States.

The President of the United States of America to Martin Aguirre, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 27th day of January next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein Bert Ross is appellent and you are appellee, to show cause, if any there be, why the order rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 6th day of January, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-sixth.

WM. W. MORROW,
Circuit Judge.

I hereby admit service of copy of the foregoing citation this seventh day of January, 1902.

M. G. AGUIRRE,
Warden California State Prison, at San Quentin.

(Indorsed:) No. 13191. In U. S. circuit court, N. D. Cal. In the Supreme Court of the United States. In the matter of Bert Ross, on habeas corpus. Citation on appeal. Filed January 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk. In U. S. circuit court, N. D. Cal.

37 (Indorsment on cover:) File No. 18,382, N. California C. C. U. S. Term No. 228, Bert Ross, appellant, vs. Martin Aguirre, warden of the State prison of the State of California, at San Quentin, California. Filed January 25, 1902.

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